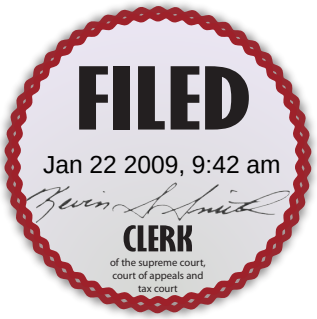

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IN THE
COURT OF APPEALS OF INDIANA

DAVID MOSEBY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0802-CR-102
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable H. Patrick Murphy, Commissioner
Cause No. 49G23-0602-FA-24722

January 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

David Mosby[1] appeals his conviction of possession of a firearm by a serious violent felon, a Class B felony.[2] Mosby claims he had the firearm for self-defense. We disagree and affirm.

FACTS AND PROCEDURAL HISTORY

On February 9, 2006, Mosby was living in Indianapolis with his girlfriend, Nila Ross. Mosby invited his friend, Delbert Douglas, to visit. Douglas arrived at Mosby's house at 4:30 a.m. with his girlfriend, Linda Mattox. Over the next 10 hours, Douglas and Mattox used crack cocaine at Mosby's house. Just before 2 p.m., a confidential informant, whom Mosby believed to be Mattox's husband, arrived at Mosby's house and stayed only briefly. About a minute after that man left, police executed a search warrant of Mosby's house, arrested everyone present, and found a handgun in Mosby's pocket.

The State charged Mosby with Class A felony dealing in cocaine,[3] Class B felony possession of cocaine,[4] Class C felony possession of cocaine and a handgun,[5] and unlawful possession of a firearm by a serious violent felon. Just before trial, the State dismissed the three cocaine charges. At a bench trial, Mosby admitted he was a serious violent felon and he had the handgun, but claimed he held the gun only to protect himself and Ross from Mattox. According to Mosby, Mattox was acting erratically after using cocaine, she made threatening statements to Ross, and she had a gun in her purse. Police

[1] The Abstract of Judgment, Transcripts, and Briefs indicate the defendant's name is "Moseby." However, at trial, he testified the correct spelling of his name is "Mosby." We will use the spelling he provided at trial.
[2] Ind. Code § 35-47-4-5.
[3] Ind. Code § 35-48-4-1.
[4] Ind. Code § 35-48-4-6.
[5] Ind. Code § 35-48-4-6.

confirmed Mattox had a gun in her purse when they executed the search warrant, but no testimony confirmed the remainder of Mosby's claims.

The court found:

> Well if Mr. Mosby's testimony was truthful, which I have serious doubts about, and I don't find it especially credible. Nevertheless, too, on self defense, you have to be in a position where you've not caused the predicament, and I think that allowing people to come and use cocaine at your house, putting the -- creating -- helping to create the situation, I think, would also defeat the self defense claim. I don't find, in any event, Mr. Mosby to be especially credible. I'm finding him guilty of Count Three which is the Serious Violent Felon charge.

(Tr. at 79.)

DISCUSSION AND DECISION

Ind. Code § 35-47-4-5(c) provides: "A serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon, a Class B felony." Mosby's defense was that he possessed the handgun in self-defense.[6] Our self-defense statute provides:

> (a) A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. However, a person:
>
> (1) is justified in using deadly force; and
>
> (2) does not have a duty to retreat;
>
> if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. No person in this state shall be placed in legal jeopardy of

[6] The State invites us to hold a defendant charged with possession of a firearm by a serious violent felon cannot assert he acted in self-defense. We have already declined that invitation:

> Indiana's prohibition against a felon possessing a firearm was not intended to affect his or her right to use a firearm in self-defense, but was intended only to prohibit members of the affected classes from arming themselves with firearms or having such weapons in their custody or control in circumstances other than those in which the right to use deadly force in self-defense exists or reasonably appears to exist.

Harmon v. State, 849 N.E.2d 726, 734 (Ind. Ct. App. 2006).

> any kind whatsoever for protecting the person or a third person by reasonable means necessary.

Ind. Code § 35-41-3-2.

"A valid claim of self-defense is a legal justification for an act that is otherwise defined as 'criminal.'" *Harmon v. State*, 849 N.E.2d 726, 730 (Ind. Ct. App. 2006). To prevail on a self-defense claim, a defendant must demonstrate he was in a place he had a right to be; did not provoke, instigate, or participate willingly in the violence; and had a reasonable fear of death or great bodily harm. *Id.* The amount of force a person may use to protect himself depends on the urgency of the situation. *Id.* at 730-31. However, if a person uses "more force than is reasonably necessary under the circumstances," his self-defense claim will fail. *Id.* at 731.

When a defendant claims he acted in self-defense, the State bears the burden of disproving his claim beyond a reasonable doubt. *Hood v. State*, 877 N.E.2d 492, 497 (Ind. Ct. App. 2007), *trans. denied* 891 N.E.2d 40 (Ind. 2008). To meet this burden, the State may rebut his defense directly, affirmatively demonstrate he did not act in self-defense, or simply rely on the sufficiency of its case in chief. *Id.* Whether the State has met this burden is a question for the factfinder. *Id.* We may not reweigh the evidence or assess witness credibility, and if sufficient evidence of probative value supports the trial court's conclusion, we will affirm. *Id.*

The trial court rejected Mosby's claim of self-defense on two separate grounds: (1) Mosby created the situation that he alleged required him to possess the gun in self-defense; and (2) the court had "serious doubts about" the truthfulness of Mosby's

testimony. (Tr. at 79.) We address each in turn.

Mosby asserts "there is no evidence that Mosby 'allowed' [Mattox] to use cocaine in his home in the sense that he approved of or consented to her doing so." (Appellant's Br. at 10.) He further claims "even if Mosby had condoned [the use of cocaine in his house], his allowing [Mattox] to use cocaine in his home, while not laudable, was not a crime." (*Id*.) We cannot agree. "A person who knowingly or intentionally maintains a building . . . that is used one (1) or more times: (1) by persons to unlawfully use controlled substances . . . commits maintaining a common nuisance, a Class D felony." Ind. Code § 35-48-4-13. Accordingly, when Mosby allowed Mattox and Douglas to use cocaine in his home, with or without his approval, he presumably committed a Class D felony.

Even if Mosby did not create the situation in his house, the trial court simply did not believe Mosby's testimony regarding his need to defend himself and Ross from Mattox. Mosby acknowledges "[t]he only evidence regarding what happened inside Mosby's home before the police arrived . . . was the testimony of Mosby himself." (Appellant's Br. at 5.) The trial court explicitly found his testimony lacked credibility, and we may not second guess its determination. *See Kiefer v. State*, 761 N.E.2d 802, 803 (Ind. 2002) ("we will not invade the province of the [factfinder] and . . . assess the credibility of witnesses"). The trial court was not required to believe Mosby's self-serving testimony about Mattox becoming erratic and threatening Ross. Mosby could have called additional witnesses or asked the police officers about Mattox's demeanor upon their arrival, but he chose not to do so.

We affirm Mosby's conviction of possession of a handgun by a serious violent felon.

Affirmed.

NAJAM, J., and ROBB, J., concur.